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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re ANGELINA S., A Person Coming Under the Juvenile Court Law.	
FRESNO COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ELSA R., Defendant and Appellant.	F039694 (Super. Ct. No. 95116-0) **O P I N I O N**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Martin C. Suits, Judge. (Retired judge of the Mun. Ct. for Kings Jud. Dist. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

Maureen L. Keaney, under appointment by the Court of Appeal, for Defendant and Appellant.

Phillip S. Cronin, County Counsel, and Juliana F. Gmur, Deputy County Counsel, Plaintiff and Respondent.

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[*] Before Dibiaso, Acting P.J., Buckley, J., and Cornell, J.

Elsa R. appeals from an order terminating her parental rights (Welf. & Inst. Code, § 366.26) to her daughter, Angelina S.[1] Appellant contends the court should have modified its prior orders and placed Angelina in the family home or should have found termination would be detrimental to Angelina. Last, appellant urges this court to give retroactive application to a recent change in the law and consequently reverse the judgment. On review, we will affirm.

PROCEDURAL AND FACTUAL HISTORY

At her birth in June 1999, Angelina tested positive for methamphetamines. Respondent Fresno County Department of Children and Family Services (the department) consequently initiated dependency proceedings as to Angelina and her three older siblings due to appellant's substance abuse (§ 300, subd. (b)). As of January 2000, the Fresno County Superior Court adjudged Angelina and the other siblings dependent children of the court, removed them from appellant's custody and ordered a variety of reunification services for appellant.

In addition to her prenatal drug exposure, Angelina was born prematurely and suffered from intrauterine growth retardation. Consequently, Angelina required placement in a special-needs, foster home. Indeed, over the course of these proceedings, the infant had digestive problems which were exacerbated by stress. She tended to vomit when her stress level rose. She also could not look people in the eye. Angelina was easily upset when her normal daily routine was disrupted. Being around loud noises or being picked up and moved a lot was enough to upset her and cause her to become ill and rapidly lose weight. This proved to be particularly problematic when she had visits with her older siblings who had been placed elsewhere. Her brothers who were two and four years older than Angelina were loud and unruly. Nevertheless by mid-year 2000,

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Angelina and appellant had developed a relationship and a bond to the point where appellant could console Angelina and the child was able to stay in her mother's care for long periods of time.

Appellant made significant progress with her reunification plan such that her older children were returned to her care, subject to family maintenance services, by the six-month review stage. Angelina, however, remained in foster care placement, with liberal family visitation. She was visiting for as much as five-days-a-week. Appellant still needed to complete a CPR class. Once that occurred and Angelina was medically stable, the court authorized the department to initiate an extended visit for her and her family.

The extended visit between Angelina and her family, however, never occurred. Appellant did not attend CPR training and Angelina's poor health persisted. Although appellant tried to keep the older children away when Angelina visited, Angelina would return to her foster home exhausted and stressed. By the end of December 2000, Angelina's doctor reported the following:

> "This 18 month old female decompensates when visiting her mother. She had actually lost weight after her last visit. She is now getting some of the weight back. [¶] I am concerned about her health and development and believe she should not spend time alone with her mother and/or family for at least three months or until early [A]pril, 2001."

In preparation for the 12-month review hearing, the department recommended an extension of further services to appellant. Counsel for Angelina objected and requested a contested hearing. He represented that the family's current circumstances were quite unstable. According to counsel, Angelina had recently lost two pounds during a visit when the father allegedly violated a restraining order and was aggressive towards appellant. Angelina was purportedly a witness to the incident.[2]

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[2] Counsel's report was later confirmed.

By the time of the contested hearing date, the department agreed services should be terminated for the mother as well as the father. Although appellant received notice of the hearing, she did not attend and her attorney did not know what appellant's position was. The court took appellant's default and terminated all family reunification services. The court also restricted appellant's visitation to supervised visits with the understanding they could be unsupervised when she completed CPR training. Finally, the court set a section 366.26 hearing for a date in June 2001.

Appellant eventually finished her CPR class so that she resumed unsupervised visits in April although they were limited to two hours a week. Angelina did appear to enjoy her visits with appellant and her siblings. Meanwhile, the foster mother also invited appellant to Angelina's birthday party and medical appointments but appellant did not attend. Appellant was also invited to attend Angelina's appointments at the Central Valley Regional Center where she was a client.[3] Again, however, appellant did not attend. The department had further information that appellant tested positive for methamphetamines in mid-May. Appellant would later say she relapsed in May when she had no hope of reunifying with Angelina.

In preparation for the section 366.26 hearing, the department prepared an assessment detailing the foregoing information, among other things, and recommending that Angelina be freed for adoption. Her foster parents, with whom Angelina had been placed since shortly after her birth, wished to adopt her.

Due to a delay in completing a bonding study between appellant and Angelina, the section 366.26 hearing did not occur until November 2001. In the interim, Angelina's physical health had worsened. She was experiencing some form of seizures. Although further testing would be required, her physician prescribed medication in the event of a

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[3] Angelina suffered from developmental delay. As of June 2001, when she was 2 years old, Angelina's cognitive abilities were that of a 13-month old.

grand mal seizure. Because the mother did not have a telephone, the department was concerned about what would occur if Angelina had a grand mal seizure during a visit. Also, during a July visit, Angelina said "No" and later screamed when her foster mother tried to give the child to appellant. As a consequence of these circumstances, the court in August 2001, modified appellant's visits with appellant, adding that they be supervised by a third party.

When the bonding study was finally completed, the psychologist reported the following impressions.

> "There is a weak bond between [appellant] and Angelina. Their relationship is one of a familiar adult and a child rather than a parent child relationship. There was no evidence of a substantial emotional attachment from the child to the parent.
>
> "[Appellant] also knows there are things lacking in her relationship with Angelina and that she is more bonded with the foster mother given the length of time she has lived with her. It will promote the well being of Angelina to have a permanent home with adoptive parents to such a degree as to outweigh the well being she would gain in reuniting with her biological mother.
>
> "The foster mother states she is open to Angelina continuing her relationship with [appellant] and her siblings. This type of open adoption would benefit everyone."

At the section 366.26 hearing, the department submitted on its previous assessment and reports as well as the bonding study. Appellant called as a witness the psychologist who conducted the bonding study. The psychologist reaffirmed her written impressions.

Appellant also testified on her own behalf disputing some of the department's evidence. She opposed adoption. She felt strongly about a family being together. She also believed she could presently care for Angelina and wanted her returned. Although she admitted she was unfamiliar with Angelina's medication, she felt she could administer them based on her CPR training. By the time of trial, Angelina took anti-

seizure medication multiple times a day. In appellant's opinion, Angelina recognized her and the other children and appeared to enjoy seeing all of them. Appellant did agree, however, the bond between her and Angelina had weakened from the reduced visitation. She also admitted she currently did not have a parent-child relationship with Angelina.

A social worker who was then supervising the father's visits with Angelina also testified. Based on the foster mother's willingness to participate in open adoption, the social worker believed continuing physical contact with her parents and siblings would benefit Angelina. "It would give her an identity of where she came from." In particular, she believed Angelina's contact with her parents could be appropriate so long as it was separate. Although she was aware appellant had a restraining order against the children's father, the social worker had witnessed the father call appellant on the cell phone. Appellant would accept those calls and speak with him.

Appellant's counsel commenced closing argument in the case by "making an oral 388 motion for the return of the minor to the mother." Counsel cited her client's suitable home, CPR training and ability to administer medication. Alternatively, counsel urged the court not to terminate parental rights based on the psychologist's and the social worker's opinions that Angelina would benefit with continued contact. Following additional argument by the parties, the court made the necessary findings and orders to terminate parental rights.

DISCUSSION

I. *Oral Motion To Return Angelina To Appellant's Care*

Appellant argues the court erroneously denied her motion made at the end of the section 366.26 to return Angelina to her custody. We disagree.

By way of background, we observe a juvenile court dependency order may be changed, modified, or set aside at any time. (§ 385.) A parent may petition the court for such a modification on grounds of change of circumstance or new evidence. (§ 388.)

The parent, however, must also show that the proposed change would promote the best interests of the child. (§ 388; Cal. Rules of Court, rule 1432(c).)

On a modification petition, the parent has the burden of proving such a change is warranted. (*In re Audrey D.* (1979) 100 Cal.App.3d 34, 43.) The standard of proof on such a petition is by a preponderance of the evidence. (*In re Fred J.* (1979) 89 Cal.App.3d 168, 175.) Whether the juvenile court should modify a previously made order rests within its discretion; its determination may not be disturbed unless there has been a clear abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

> "After the termination of reunification services, the parents' interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point 'the focus shifts to the needs of the child for permanency and stability' (*In re Marilyn H.* [1993] 5 Cal.4th 295, 309), and in fact, there is a rebuttable presumption that continued foster care is in the best interests of the child. (*Id.*, at p. 302.) A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child." (*In re Stephanie M., supra*, 7 Cal.4th at p. 317.)

Simply put and setting aside questions about the procedural propriety of appellant's motion (see *In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 609; Cal. Rules of Court, rule 1432) and whether appellant made the requisite showing of changed circumstances or new evidence (§ 388), the evidence before the court at the section 366.26 hearing did not establish Angelina's need for permanency and stability would be advanced by an order placing her in appellant's care.

II. ***Lack of Detriment***

Next, appellant claims the court should have selected a permanent plan other than adoption in Angelina's case. The mother urges she maintained regular visitation and contact with Angelina who would benefit from the continued contact. On review of the record, we are not persuaded the court erred.

As appellant acknowledges, if there is clear and convincing proof of adoptability, a point which is uncontested here, the juvenile court must terminate parental rights unless, relevant to this appeal, the parent produces evidence sufficient to persuade the court that the child would benefit from continuing the parent-child relationship. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343.) When a juvenile court rejects the parent's detriment claim and terminates his or her rights, the appellate issue is whether the juvenile court abused its discretion. (*In re Jasmine D.* (2000) 78 Cal.App4th 1339, 1350.) The statutory presumption is that termination is in the child's best interests and therefore not detrimental unless the parent proves otherwise. (§ 366.26, subd. (b); *In re Lorenzo C.*, *supra*, 54 Cal.App.4th at p. 1343-1344.) The social service agency has no burden to acquire and introduce at the permanency planning hearing evidence specifically directed to the issue of whether the minor would benefit from continued contact with a parent. (*In re Lorenzo C.*, *supra*, 54 Cal.App.4th at p. 1334, citing § 366.26, subd. (c)(1)(A).) Therefore, we do not review the record, as appellant argues, for sufficient evidence that termination of the parents' rights would not be detrimental.

Additionally, while appellant would have us castigate the judge for his reasoning in terminating her parental rights, we remind appellant that the juvenile judge's reasoning is not, however, a matter for this court's concern. (See *Davey* v. *Southern Pac. Co.* (1897) 116 Cal. 325, 329.) It is judicial action and not judicial reasoning which is the proper subject of appellate review. (*El Centro Grain Co.* v. *Bank of Italy Nat. Trust & Savings Assn.* (1932) 123 Cal.App. 564, 567.)[4]

Our review of the record supports the juvenile court's exercise of discretion in rejecting the mother's claim of detriment. (*In re Stephanie M.* (1994) 7 Cal.4th 295,

[4] Similarly, we reject appellant's claim that the judge's remarks denied her due process.

318.) No doubt appellant loved Angelina and maintained visitation and contact with her. However, that is not enough.

> "The existence of interaction between natural parent and child will always confer some incidental benefit to the child. Nevertheless, the exception in section 366.26, subdivision (c)(1)(A), requires that the parent-child relationship promote the well-being of the child to such a degree that it outweighs the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Lorenzo C., supra*, 54 Cal.App.4th at p. 1342.)

We are satisfied on review of this record that the juvenile court properly exercised its discretion in rejecting appellant's detriment argument.

III. ***Section 366.26, Subdivision (c)(1)(E)***

Last, appellant contends termination of her parental rights was detrimental to Angelina because it would substantially interfere with her sibling relationship. In so arguing, appellant relies on a recent legislative modification of section 366.26, subdivision (c)(1) which identifies the specific circumstances in which the court can find termination of parental rights would be detrimental to the dependent child. Effective January 1, 2002, section 366.26, subdivision (c)(1)(E) provides a court can find termination would be detrimental to a dependent child if:

> "[t]here would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption."

Appellant contends she is entitled to retroactive application of this legislative amendment. Once again, we disagree with appellant.

Legislative enactments are generally presumed to operate prospectively and not retroactively unless the Legislature expresses a different intention. (*Evangelatos v.*

Superior Court (1988) 44 Cal.3d 1188, 1208.) Whether a law will apply retroactively or prospectively is a policy question for the Legislature. (*Id.* at p. 1206.) The courts will not give a law retroactive application unless the Legislature expresses a clear intent that it apply in such a manner. (*Id.* at p. 1207.)

At most, appellant points to arguments voiced by the legislation's author and a supportive organization.[5] However, those remarks hardly constitute a clear expression of the Legislature's intent as a whole. (*Evangelatos v. Superior Court, supra,* 44 Cal.3d at p. 1207.)

Appellant also analogizes the amendment of section 366.26, subdivision (c)(1) to a statutory modification which lessens punishment for a criminal offense in which case the lesser penalty applies to any case that is not yet final (see *People v. Rossi* (1976) 18 Cal.3d 295, 304). We fail to see the parallel. While appellant apparently sees the change in law as improving the lot of dependent children, we would remind her, as the court explained in *Evangelatos v. Superior Court, supra*, 44 Cal.3d at page 1213:

> "[m]ost statutory changes are, of course, intended to improve a preexisting situation and to bring about a fairer state of affairs, and if such an objective were itself sufficient to demonstrate a clear legislative intent to apply a statute retroactively, almost all statutory provisions and initiative measures would apply retroactively rather than prospectively." (*Ibid.*)

DISPOSITION

The order terminating parental rights is affirmed.

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[5] In this regard, we granted appellant's request for judicial notice of the legislative history on section 366.26, subdivision (c)(1)(E).